

PLEADING A NON-CITIZEN DEFENDANT TO CALIFORNIA FRAUD AND THEFT OFFENSES

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1. **Avoiding a Finding that a Fraud Offense Resulted in a Loss to the Victim of \$10,000 or More**
2. **Avoiding a Conviction of Theft, or Theft by Fraud, with a Year or More Sentence Imposed**
3. **Aiding and Abetting – the Constant Alternative**

Convictions of fraud or theft always pose some danger to immigration status. With some technical exceptions, conviction of any offense that includes fraud or theft as an element is a "crime involving moral turpitude."²

An even more serious threat, however, is that the conviction also may constitute an "aggravated felony," which carries the worst possible immigration consequences. A conviction for an offense involving fraud where the loss to the victim is more than \$10,000 is an aggravated felony. So is a theft conviction if a sentence of a year or more was imposed.³ There are ways to avoid these consequences, but the issue has become more complex. The good news is that a conviction for aiding and abetting theft – or arguably any California offense -- is not an aggravated felony.

This memo provides important update information. For more discussion see the free on-line resource, "Quick Reference Chart and Notes" on www.ilrc.org/criminal.html, and for in-depth discussion see Brady, Tooby, Mehr, *California Criminal Law and Immigration* (ILRC 2004, at www.ilrc.org), and Tooby, *Aggravated Felonies* (www.criminalandimmigrationlaw.com).

1. Avoiding a Finding that a Fraud Offense Resulted in a Loss to the Victim of \$10,000 or More.

The Issue: *Chang v INS* provided a good blueprint for avoiding a federal conviction for fraud with "loss to the victim" of \$10,000, even if more than \$10,000 was ordered to be paid in restitution. However, because under California law the restitution amount can be held equal to the loss to the victim, we must look for additional defense strategies in cases such as welfare or credit card fraud with restitution ordered of more than \$10,000.

Discussion. An offense that "involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000" is an aggravated felony.⁴ In *Chang v INS*, Mr. Chang presented a written plea agreement from his prior single conviction for bank fraud under 18 USC §1344. It showed that he and the government had stipulated that the "loss to the victim" in the count of conviction was \$605.30. Elsewhere in the plea agreement he

¹ Thanks to Michael Mehr, Norton Tooby and Don Ungar for their valuable input and ideas on these issues.

² See discussion in "Note: Crimes Involving Moral Turpitude" at Quick Reference Chart and Notes at www.ilrc.org/criminal.html

³ See 8 USC §§ 1101(a)(43)(M)(i) (\$10,000 fraud loss) and 1101(a)(43)(G) (theft) and "Note: Aggravated Felonies" and "Note: Theft and Fraud Offenses" at www.ilrc.org/criminal.html.

⁴ 8 USC §§ 1101(a)(43)(M)(i).

agreed to pay total restitution of over \$30,000 for the entire scheme. His sentence agreement also reflected the \$30,000 restitution amount. While the INS charged that the restitution amount was the loss to the victim, the Ninth Circuit held that under a categorical analysis the INS had to “take the plea agreement as the agency finds it.”⁵ The detailed information in the plea agreement trumped the restitution amount ordered, and the conviction was held not to be an aggravated felony.

Under *Chang*, we hoped that California defenders could avoid an aggravated felony conviction by specifying in a written plea agreement that the loss to the victim from the offense of conviction was less than \$10,000, even if a total restitution of more than \$10,000 was ordered. However, the Ninth Circuit recently held a California welfare fraud conviction to be an aggravated felony, and here is the complication.

In *Ferreira v. Ashcroft*, the defendant was convicted under Calif. W&I §10980(c)(2). His plea agreement did *not* specify a loss of less than \$10,000 to the victim, and restitution of \$23,000 was ordered. The Ninth Circuit found that this case was distinguishable from *Chang*, and therefore was an aggravated felony, for two reasons. First, the defendant lacked the *Chang* statement in the plea agreement that the loss to the victim was less than \$10,000. Second, the Court noted that “California law provides that a restitution order in favor of a government agency shall be calculated based on the actual loss to the agency.” The Court cited P.C. §1202.4(f) (providing that a victim of crime shall receive restitution directly from a defendant “in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court”) and *People v. Crow*, 6 Cal.4th 952, 954-55, 26 Cal.Rptr.2d 1, 864 P.2d 80 (1993) for the proposition that under California law, a restitution order must equal the loss to the victim.⁶

To be sure of avoiding an aggravated felony conviction, counsel should get a *Chang* written plea agreement to plead guilty to a count (say, one month of welfare) in which the loss to the victim is set at \$10,000 or less. This distinguishes *Ferreira* so it is not completely on point, but leaves open the possibility that immigration or federal court would feel the second distinguishing feature identified by *Ferreira* – the assertion that under California law restitution equals loss to the victim -- would be sufficient to distinguish *Chang*’s result and find that the conviction is an aggravated felony. The following are initial suggestions. Creative defense counsel, we welcome ideas and comments.

- If a plea can be put off until the person pays back enough of the money so that the plea agreement can reflect a loss to the victim and restitution payment of under \$10,000, the conviction is not an aggravated felony as fraud.
- Sometimes judges order restitution “in an amount as determined by probation.” See 1202.4(f) (“If the amount of loss cannot be ascertained at the time of

⁵ *Chang v INS*, 307 F.3d 1185, 1190 (9th Cir. 2002).

⁶ *Ferreira v Ashcroft*, 390 F.3d 1091, 1099-1100 (9th Cir. 2004).

sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court." See also *People v. Lunsford* (1997) 67 Cal.App.4th 901 (1998) (restitution order directing agency to determine amount of restitution was enforceable, where proper amount of restitution could not be ascertained at time of sentencing.) Defense counsel can insist that in return for a plea, the amount of restitution shall be determined by the probation officer. It is at least arguable that the subsequent determination by the probation officer would not be part of the "record of conviction" and not be reviewable in a subsequent immigration or federal proceeding.

- Except for something like "welfare fraud" which has a specific statute covering a specific type of fraud, many crimes involving fraud or deceit can also be considered crimes of theft in that someone is deprived of property. A plea to the first clause of P.C. 484 "...who shall feloniously steal, take, carry, lead, or drive away the personal property of another" does not have fraud or deceit as an element. If restitution was ordered in an amount exceeding \$10,000 for a count based on the first clause of P.C. §484, there would be no aggravated felony, provided there was no sentence of one year or more. (Conviction of a theft offense is an aggravated felony if a sentence of a year or more is imposed. See "Note: Theft" at www.ilrc.org/criminal.html. and discussion in section 2, *infra*.)
 - To avoid an aggravated felony for crimes of theft with a sentence of one year or more a defendant can plead to P.C. 484 "in the exact language of the statute" or simply add a new count to the complaint to state merely "violation of P.C. 484" without any other verbiage. Under *U.S. v Corona-Sanchez*, this would not be an aggravated felony even with a sentence of one year or more because it is overbroad. To the extent that the separate clauses in the statute are set forth in the disjunctive, a defendant could even be ordered to pay restitution of \$10,000 or more, and this would not be an aggravated felony.
- If a civil suit had been brought, an order could reflect that restitution would be paid according to the civil suit settlement.

2. **Avoiding a Conviction of Theft, or Theft by Fraud, with a Sentence Imposed of A Year of More**

Immigration authorities are likely to charge that a crime such as welfare fraud also constitutes "theft," and hence is an aggravated felony if a sentence of a year or more is imposed – even if the "loss to the victim" did not equal \$10,000. Immigration defense counsel can argue that fraud is not theft and does not fit within the definition of an aggravated felony offense because the elements are distinct. Still, criminal defense counsel should avoid a year's sentence imposed on any single count of an offense that can be construed as theft. For a discussion of alternate dispositions that would work for immigration purposes see Note: Sentence Solutions" at www.ilrc.org/criminal.html. See also suggestions for avoiding the aggravated felony theft in section 1, *supra*.

3. Aiding and Abetting – the Constant Alternative

The Ninth Circuit has held that because of the breadth of the California definition of aiding and abetting, a conviction for aiding and abetting an offense such as theft is not an aggravated felony as theft even if a sentence of a year or more is imposed. *Martinez-Perez v Ashcroft*, 393 F.3d 1019 (9th Cir. 2005) (a plea to aiding and abetting grand theft under Calif. P.C. § 487(c) would not be an aggravated felony even if a sentence of a year or more were imposed);⁷ *Penuliar v Ashcroft*, 395 F.3d 1037, 1045-46 (9th Cir. 2005) (vehicle taking in violation of Cal. V.C. §10851(a); see discussion in *United States v Corona-Sanchez*, 291 F.3d 1201, 1207-08 (9th Cir. 2002)(*en banc*) (petty theft with a prior in violation of Cal. P.C. §§ 490, 666).

The Ninth Circuit further has recognized that under California law, an accusatory pleading against an aider or abettor may be drafted in a form identical to an accusatory pleading against the person alleged to have directly committed the offense. **Therefore a plea of guilty to a charge alleging that the defendant directly committed, e.g., theft, does not prove that he or she did not plead guilty under an aiding or abetting theory, and does not prove that the offense of conviction was an aggravated felony.** *Penuliar v Ashcroft*, 395 F.3d at 1045-46 (9th Cir. 2005) (noncitizen's plea to a charge alleging that he unlawfully took a vehicle did not make him deportable as an aggravated felon, because it did not eliminate the possibility that he was convicted as an aider and abettor); *Corona-Sanchez, supra*; see Cal. Penal Code §§ 971, 31; see also *People v. Greenberg*, 111 Cal. App. 3d 181, 188, 168 Cal. Rptr. 416 (Ct. App. 1980). But see *Martinez-Perez, supra* (the Court held, without considering P.C. §§ 971,31, that the record of conviction showed that Mr. Martinez was not convicted of aiding or abetting. However, the Court has requested supplemental briefing in order to reconsider its holding).

This opens a tremendous opportunity for defense. As long as the record of conviction does not exclude the possibility under California law that the defendant was convicted for aiding and abetting, the offense is not an aggravated felony, at least as defined by general terms such as theft, sexual abuse of a minor, etc. This theory might not hold up for aggravated felonies defined in relation to federal statute, if the federal statute itself includes broadly-defined aiders and abettors. The government might argue that this would not apply to \$10,000 fraud cases as well, since aiding and abetting might be held an offense that “involves” fraud in which the loss to the victim was \$10,000.

⁷ Note: *Martinez-Perez* also went on to hold, incorrectly, that the record of conviction in that case established that the person was not convicted under an aiding and abetting theory. However, the Court subsequently reopened the case on its own motion and requested further briefing on the issue in light of the U.S. Supreme Court decision in *Shepard v Ashcroft*, 125 S. Ct. 1254 (March 7, 2005). The Immigrant Legal Resource Center is representing Mr. Martinez in that appeal and we have some confidence that the Ninth Circuit will correct its earlier ruling and find that he was not convicted of an aggravated felony, under the analysis of California law described above and discussed in *Penuliar, supra*.